

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Applications of)	WT Docket No. 97-199
)	
Westel Samoa, Inc.)	File No. 00560-CW-L-96
)	
For Broadband C Block Personal)	
Communications Systems Facilities)	
)	
and)	
)	
Westel, L.P.)	File Nos. 00129-CW-L-97
)	00862-CW-L-97
For Broadband C Block Personal)	00863-CW-L-97
Communications Systems Facilities)	00864-CW-L-97
)	00865-CW-L-97
)	00866-CW-L-97

TO: Honorable Arthur I. Steinberg
Administrative Law Judge

Wireless Telecommunications Bureau's Comments on Motion To Seal

1. On December 18, 1998, Anthony T. Easton ("Easton") filed a Motion to Seal, pursuant to Section 13 of the previously-submitted Settlement Agreement ("Agreement") in this proceeding. The Wireless Telecommunications Bureau ("Bureau") hereby comments on Mr. Easton's Motion.¹

I. Discretion of the Presiding Judge

2. In his Motion, Mr. Easton seeks to have Attachment E to the Agreement placed under seal. The Bureau submits that it is within the discretion of the Presiding Judge to place

¹ The Bureau received its copy of the Motion to Seal late in the day on December 21, 1998.

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Attachment E under seal. However, use of that discretion must not be arbitrary.² Rather, it must be based upon a showing of good cause by Mr. Easton,³ and upon a determination by the Presiding Judge, after consideration and balancing of all relevant factors, that Easton's privacy interests outweigh the public's rights of access to the information in question. The Bureau believes that Mr. Easton has failed to demonstrate with particularity the good cause required to justify the sealing of Attachment E. Accordingly, the Motion to Seal should be denied.

II. Law

3. There is a well-established presumption in favor of public disclosure of court documents and governmental agreements.⁴ The public's interest is particularly legitimate and

² See Pansy v. Borough of Stroudsburg, 23 F.3d 772, 784 (3rd Cir. 1994). The case of Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 378 (1979), cited by Easton, is distinguishable from the instant case. In stating "To safeguard due the process rights of the accused the trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity and may take protective measures even when they are not strictly and inescapably necessary. Publicity concerning pretrial suppression hearings poses special risks of unfairness because it may influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial", the court found that barring the press from a pretrial suppression hearing in a criminal case and granting a temporary delay in the release of the transcript of that hearing were necessary to effectuate due process.

³ Hotel Rittenhouse Associates v. Nils, N.V. et al v. Bank of America National Trust and Savings Association, 800 F.2d 339 (3d Cir.1986) (burden is on party seeking to overcome presumption of access to show that interest in secrecy outweighs presumption, in order for documents to remain sealed from public access.).

⁴ See Doe v. Shapiro et al, 852 F.Supp. 1256, 1257 (USDC EDPa 1994); Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 161-162 (3d Cir.1993); Hotel Rittenhouse Associates v. Nils, N.V. et al v. Bank of America National Trust and Savings Association, 800 F.2d 339 (3d Cir.1986) (a motion or a settlement agreement filed with the court is a public component of a civil trial. As in the cases involving trial rulings or evidence admitted, the court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate.); Nixon v. Warner Communications, Inc., 435

important where, as in this case, one of the parties to the action is the Federal Communications Commission, a public entity,⁵ and where, as here, the case involves issues as important to the public as the validity of the FCC's auction process. "If a settlement agreement involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality."⁶ Furthermore, "Good cause [to support a protective order] is established [only] on showing that disclosure will work clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity . . . Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not support a good cause showing . . . The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order."⁷

4. While preventing embarrassment may be a factor to be considered in determining

U.S. 589, 597, 98 S.Ct. 1306, 1311, 55 L.Ed.2d 570 (1978); Littlejohn v. Bic Corp., 851 F.2d 673, 677-78 (3d Cir. 1988); Brown v. Williamson Tobacco Corp. v. Federal Trade Comm'n, 710 F.2d 1165, 1179 (6th Cir.1983) (holding that harm to reputation is not enough to overcome the presumption in favor of public access), cert. denied 465 U.S. 1100, 104 S.Ct. 1595, 80 LEd.2d 127 (1984); Society of Professional Journalists, Headliners Chapter v. Briggs, 675 F.Supp 1308 (U.S.D.C.D.Utah 1987) citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 583-84, 100 S.Ct. 2814, 2830-31, 65 L.Ed.2d 973 (1980).

⁵ Pansy v. Borough of Stroudsburg, 23 F.3d 772 at 784 (3d Cir. 1994).

⁶ Pansy, supra, at 787. See also FTC v. Standard Fin. Management Corp., 830 F.2d 404, 412 (1st Cir. 1987) (threshold for sealing is elevated because the case involves a government agency and matters of public concern); In re "Agent Orange" Prod. Liab. Litig., 99 F.R.D.645, 648-50 (E.D.N.Y.1983).

⁷ Pansy, supra, at 785, 786. See also Publicker Indus., Inc. v. Cohen, 733 F2d 1059, 1071 (3d Cir. 1984); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986), cert. denied, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987).

whether "good cause" has been shown, "an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious."⁸ As the Court stated in Daines v. Harrison, 838 F.Supp 1406 (U.S.D.C.Colo. 1993), "The parties' interest in maintaining the confidentiality of the settlement could stem from a desire not to disclose their bad behavior. Petitioners maintain that the magistrate's order was entered at the request of the parties in an effort to avoid embarrassment or harm to the reputation of the parties. This is certainly not a compelling reason to grant a confidentiality order."⁹ Even when a particularized need for confidentiality is established by the party seeking it, it is only one factor to be considered by the Judge. Similarly, the interest in furthering settlement is only one factor to be considered in the court's determination because, as one court put it, "settlements will be entered into in most cases whether or not confidentiality can be maintained. The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise. For one thing, if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial matters."¹⁰

⁸ Pansy, supra, at 786.

⁹ See Brown v. Williamson Tobacco Corp. v. Federal Trade Comm'n, supra, holding that harm to reputation is not enough to overcome the presumption in favor of public access.

¹⁰ Pansy, supra, at 787 citing United States v. Kentucky Utils. Co., 124 F.R.D.146, 153 (E.D.Ky. 1989), rev'd, 927 F.2d 252 (6th Cir.1991). Accord Anne-Therese Bechamps, Note, Sealed Out-of-Court Settlements: When Does the Public Have a Right to Know?, 66 Notre Dame L.Rev. 117, 130 (1990) ("The incentives for settling, such as saving time and expense and avoiding the publicity of trial, are still valid whether or not the parties are allowed to seal the case files."). Cf. Wilson v. American Motors Corp., 759 F.2d 1568 (11th Cir.1985). In Wilson, the court acknowledged that courts should encourage settlements. Id. at 1571 n.4. Nevertheless, the court said that encouraging monetary settlement between the parties was not even entitled to consideration in deciding whether to seal the record. Id.

5. The Freedom of Information Act ("FOIA")¹¹ describes and regulates the types of information that is and is not subject to release by a governmental agency. Attachment E does not fall into a category of documents protected from public inspection under FOIA and, thus, is the type of document normally made available for public inspection by the Bureau.¹² Where, as here, it is likely that the information is accessible under relevant freedom of information laws, there is a strong presumption against entering or maintaining an order of confidentiality.¹³ Accordingly, where a governmental entity is a party to litigation, no protective, sealing or other confidentiality order should be entered without consideration of its effect on disclosure of government records to the public under state and federal freedom of information laws. An order binding governmental entities should be narrowly drawn to avoid interference with the rights of the public to obtain disclosure of government records and should provide an explanation of the extent to which the order is intended to alter those rights. "[W]e believe that a strong presumption against entering or maintaining confidentiality orders strikes the appropriate balance by recognizing the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens. Neither the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by

¹¹ See 5 U.S.C. §552 and 47 C.F.R. §0.451.

¹² See 47 C.F.R. §0.457.

¹³ Pansy, supra, at 791.

freedom of information laws."¹⁴

III. Argument

6. In his Motion, Mr. Easton primarily argues that Attachment E should remain under seal because (1) "the burden of the litigation," the "nature of the disputes" and "the settlement process" were difficult for him, emotionally and financially; (2) "he had no bargaining power and no realistic opportunity to negotiate terms;" (3) Attachment E "is susceptible to use for improper purposes damaging to his reputation and the well being of his family;" (4) the sealing of Attachment E "supports and sustain[s]" the settlement in this case; (5) the Bureau "has no compelling interest in seeing Attachment E made public" since, by entering into this settlement, it has waived its opportunity to prove its allegations of wrongdoings, and (6) it is "equitable to seal Attachment E" because Mr. Easton has sacrificed the most in this matter. As the Bureau will show, Mr. Easton's arguments are factually incorrect and legally without merit. Furthermore, they do not satisfy the "good cause" burden of proof required to justify placing Attachment E under seal. Each of his arguments is addressed below.

7. Contrary to his assertions, Mr. Easton was not forced or bullied into settling this case. Like all of the parties, he was a willing and active participant in the settlement negotiations and was represented by counsel who vigorously protected his interests in this matter. Although these matters are irrelevant to the issue for determination by the Presiding Judge, Mr. Easton had every incentive indeed to settle this proceeding. Thus, he will likely be the recipient of a consideration sum of money as the result of voluntarily settling this case.

¹⁴ Pansy, supra, at 791.

Additionally, a settlement would avoid the further expenditure of money and alleviate the inconvenience associated with continued litigation. Also, Mr. Easton, would avoid adverse publicity from a public hearing. Finally, and perhaps most importantly, he would avoid an adverse finding of misconduct by the Commission.

8. Mr. Easton's argument that he was powerless to negotiate with the Bureau is equally false. The language contained in Attachment E was agreed to by both parties *as a compromise* between what the Bureau wanted and what Mr. Easton sought. If, as Mr. Easton argues, the Bureau dictated the terms of settlement, Attachment E would likely contain terms that are different from the present language.

9. While Mr. Easton's allegation that he and his family might possibly suffer some vaguely-worded harmful consequences comes closest of all of his arguments to stating a reason for placing Attachment E under seal, this allegation falls far short of carrying the burden needed to overcome the presumption in favor of public access. Mr. Easton fails to state valid reasons or to discuss in any way his reasons for making the assertion that harm will, or is likely to, result from public access to Attachment E. He also fails to produce any evidence in support of this assertion. In short, he has failed to show the probability of any specific harm to himself or his family by the release of Attachment E. Since his assertions of harm are neither reasoned, clearly defined, nor articulated with specificity -- as required by the law -- his request for confidentiality must be denied.

10. Mr. Easton signed the Agreement prior to its submission to the Judge. He now argues that sealing Attachment E is warranted because he heeded the Judge's encouragement of settlement and because granting his motion is a way to "support and sustain" the

Agreement. Mr. Easton appears to suggest that the Judge somehow "owes him" because he agreed to participate in a settlement or that the Agreement may be "jeopardized" if the Judge does not grant this request for confidentiality. If such an implication was intended, Mr. Easton's argument is unconscionable. By signing the Agreement, Mr. Easton has already agreed to support the settlement in this case. He fails to disclose how denying public access to Attachment E "supports" or "sustains" the settlement. It is the Bureau's position that grant of this motion neither supports or sustains the settlement. To the contrary, releasing only a portion of the Agreement complicates matters¹⁵ and contributes to the probability that the public will misinterpret the facts surrounding the case and the settlement.

11. The parties in this proceeding, including Mr. Easton, agreed to settle this case because each considered settlement to be in his/its best interest. While the Presiding Judge may have encouraged a settlement of this proceeding, that interest does not outweigh the public's right to access.¹⁶

12. The Bureau is committed to serving the public's interest. Public disclosure of Attachment E is in the best interest of the public, the Bureau and the Commission. The public's ability to understand and correctly interpret all of the terms of the Agreement will be impeded without access to Attachment E. As pointed out in his Motion, Attachment E is not an admission of wrongdoing by Mr. Easton. By implication, however, it offers an explanation

¹⁵ For example, there may be conflicting determinations in deciding whether Attachment E is available for public inspection in response to an in-person request to view the case file maintained by the Office of the Secretary of the Commission versus a FOIA request for Attachment E.

¹⁶ Pansy, supra, at 791.

as to why Mr. Easton would agree to refrain from participation in the telecommunications industry, as required by Section 14 of the Agreement and why he would voluntarily divest himself and his family of all interests in Unicom and SuperTel .

13. Mr. Easton argues that the Bureau relinquished its interest in having Attachment E made public when it entered into the Agreement. This is incorrect. The confidentiality of Attachment E was made an issue in this case only during the final negotiations between the Bureau and Mr. Easton. Since then the Bureau has continuously opposed placing Attachment E under seal but, in the spirit of compromise, agreed to rely upon the judgment of the Presiding Judge to determine this issue.

14. Mr. Easton argues that he has sacrificed the most in furtherance of settlement and that, consequently, it is equitable to seal Attachment E. Mr. Easton has not specified what he has sacrificed nor quantified the degree of his sacrifice. In short, he has offered no evidence to support these allegations.¹⁷

15. In his Motion, Mr. Easton repeatedly asserts his innocence of all of the charges against him and implies that the Bureau's participation in the Settlement of this matter supports his assertions of innocence because the Bureau waived its opportunity to prove those charges. This claim has no merit and clearly has no bearing on the fundamental question whether Attachment E should be placed under seal.

IV. Summary

¹⁷ It could, for example, be easily argued that Mr. Breen has sacrificed the most in furtherance of a settlement in this case. He is, after all, less culpable of wrongdoing than Mr. Easton but is paying a \$100,000 fine in addition to other litigation expenses in furtherance of the settlement.

16. In summary, Mr. Easton has not met his burden of showing, with specific facts, that his interest in privacy outweighs the public's presumptive right to access. In fact, nothing has been presented which indicates that Mr. Easton would be seriously harmed by release of Attachment E. Certainly the public's right to access should not be compromised because of the *possibility* that Mr. Easton's statement *might* be misconstrued as an admission by *someone* at *some time* in the future. The greater danger is that the public might misconstrue the facts of this case because they do not have access to all of the information available regarding its settlement. Mr. Easton is simply embarrassed to acknowledge the events that have transpired. Preventing potential embarrassment for Mr. Easton is, however, insufficient reason to place Attachment E under seal.

17. Consequently, the Motion To Seal filed by Mr. Easton should be denied.

Respectfully submitted,
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December 28, 1998

CERTIFICATE OF SERVICE

I, Arlene Cook, an Administrative Assistant in the Enforcement and Consumer Information Division, Wireless Telecommunications Bureau, certify that I have, by First Class United States mail, this 28th day of December 1998, forwarded copies of the foregoing pleading to:

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